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BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Satellite Delivery of Network) CS Docket No. 98-201
Signals to Unserved Households for) RM-9335
Purposes of the Satellite Home) RM-9345
Viewer Act)
)
(Part 73 Definition and Measurement)
of Signals of Grade B Intensity))

TO: The Commission

COMMENTS OF WITHERS BROADCASTING COMPANIES

Withers Broadcasting Company of West Virginia, licensee of Television Broadcast Station WDTV, Weston, West Virginia, Withers Broadcasting Company of Texas, licensee of Television Broadcast Station KAVU-TV, Victoria, Texas, and W. Russell Withers, Jr., licensee of Television Broadcast Stations KREX-TV, Grand Junction, Colorado and satellite Television Broadcast Stations KREY-TV, Montrose, Colorado and KREG-TV, Glenwood Springs, Colorado (collectively "Withers"), hereby respectfully submits their consolidated Comments in the above-referenced proceeding.

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Preliminary Statement

1. Withers is licensee of television stations operating in small markets. WDTV(TV) is the CBS affiliate in the Weston/Clarksburg, West Virginia market, the nation's 164th largest DMA (out of 211 DMAs)¹. KREX-TV (with satellites KREY-TV and KREG-TV) is the CBS affiliate in the Grand Junction, Colorado market, the nation's 191st largest DMA. KAVU-TV is the ABC affiliate in the Victoria, Texas market, the nation's 206th largest DMA.

2. As a small market television operator, Withers' stations' ability to reach and circulate in every possible television household in each of the markets they serve is crucial to their future survival to serve the public interest with local news and information. Therefore, Withers strenuously objects to any lessening of the area in which its stations are entitled to receive must-carry and network program non-duplication protection under the Commission's cable television and DBS rules.

Discussion

3. The proposals set forth by National Rural Telecommunications Cooperative (NRTC) and EchoStar

Communications Corporation (EchoStar) in this docket urge the Commission to abandon fundamental copyright principles in order to facilitate home satellite and DBS operators in their competition against cable television systems for customers. In this docket, the Commission must remember the foremost and overriding principles that (1) television stations have a statutorily protected copyright property interest in their signals, (2) under the terms of their licenses, their normally protected coverage contours are their Grade B contours, and (3) under Amendment 5 to the federal Constitution the licensees of television stations have a right against the deprivation of their property by action of the federal government without just compensation.

4. Therefore, to reduce "must-carry" or "non-duplication" protections to some lesser standard, even as low as the Grade A contour, is inimical to the public interest and violates television broadcasters' constitutional and statutory property rights.

5. The American commercial television system has been always based on principles of localism. With direct broadcast satellite and home satellite providers, a

¹The source for market rankings is the *NATPE Station Listing Guide, Winter, 1998*, which contains market rankings determined by the

traveller from time to time can experience the anomaly (like the undersigned recently did) of sitting in Napa, California and watching CBS programming on WRAL-TV, Raleigh, North Carolina. That a station like WRAL-TV can be seen on the west coast is certainly a feather in its cap and is a useful tool for selling a satellite antenna to a consumer. However, how this serves the public interest inherent in maintaining a local system of broadcasting—the world's finest—is unknown. Local television is an advertiser-driven medium. When local advertisers in places such as Weston, West Virginia or Montrose, Colorado come to the realization that federal laws allow the pre-emption of local signals like WDTV or KREY-TV in favor of WRAL-TV from Raleigh, North Carolina (for example), they will understandably be less willing to purchase advertising time on their local network affiliate stations. Less local advertising sales and revenues mean less local news, local public affairs, local weather, local sports, and local involvement. It is recognized that this is a time-worn argument. However, it remains the argument that the Commission must honor and accept. The public interest demands healthy local television stations. These stations must not be harmed in

order to reward a few politically-connected "superstations" or satellite providers.

6. As the Commission knows, the Satellite Home Viewer Act, as codified in pertinent part in 17 U.S.C. §119(d)(11), states unambiguously that:

(11) Local market.--The term "local market" means the area encompassed within a network station's predicted Grade B contour as that contour is defined by the Federal Communications Commission.

Only Congress has the right to change the definition of "local market". With respect to whether the FCC has the legal authority to substitute the Act's "actual site signal measurement" standard with a "predicted" standard for allowing a satellite provider to sell a "superstation" to a prospective DBS customer, 17 U.S.C. §119(d)(10) provides, and the courts have confirmed, that the test is whether the signal of the local affiliate can actually be received at the customer's household with a conventional rooftop antenna--not on a predicted basis.

7. Title 17 of the United States Code deals with copyright issues. The FCC has no jurisdiction or authority to enforce copyright claims. To the extent that definitions contained in the FCC's rules have been incorporated by reference into the copyright law, it would be highly

inappropriate for the FCC to redefine Grade B service as one thing for the Home Satellite Viewer Act, but another thing for all other purposes. Thus, the Commission may not legally change the dB μ levels which were established in 1951. Indeed, improved transmission and receiving equipment over the past 47 years has produced a significantly better picture quality today than in 1951.

8. The Commission should ensure that its standards for testing the availability of over-the-air signals not be changed. For example, the FCC must require that conventional rooftop antennas be pointed at the transmitter site of the signal in question (not away); the FCC would never suggest that a potential DBS subscriber point its dish away from the satellite whose signals would be received. Further, the FCC cannot rewrite its rules to allow reliance on an "indoor" antenna, because the copyright act is specific at 17 U.S.C. §119(d)(10) that a "conventional outdoor rooftop receiving antenna" be used.

9. Finally, the Commission must realize that DBS subscribers to network-affiliated "superstations" will not lose their access to network programming once court rulings go into effect. Those individuals will be able to get such programming—along with local news, public affairs, weather,

sports and similar programming—free and over-the-air from a local affiliate such as the Withers' stations. Moreover, it is the satellite industry—not the broadcast industry—that has duped, deceived and misled millions of innocent subscribers by failing to disclose the limits of the copyright held to deliver broadcast network programming. Given this history, the FCC and Congress must impose strict requirements on DBS and satellite carriers, now and in the future, to prevent them from deceiving and misleading the public.

Conclusion

10. Entrepreneurs such as Withers built and developed the American system of local television broadcasting into the world's finest video delivery system, which serves small markets like Weston/Clarksburg, Grand Junction and Victoria with the types and variety of quality programming, including local news, enjoyed by viewers in New York and Los Angeles. Entrepreneurs such as the cable television system and DBS, benefitted after the ground had been plowed by the over-the-air television broadcasters. Now, the satellite and DBS business, in a desire for profits, seek to circumvent recent court rulings and Congressional mandates to import network-affiliated superstations into markets where local television

stations enjoy exclusive exhibition rights to their programming, and to overtly diminish the sizes of markets, even small ones such as Weston/Clarksburg, Grand Junction and Victoria. This is wrong, this is illegal, and the Commission must put a stop to it at once.

WHEREFORE, Withers Broadcasting Companies urge that the Commission dismiss or deny the rulemaking proposals advanced by National Rural Telecommunications Cooperative and EchoStar Communications Corporation.

Respectfully submitted,

**WITHERS BROADCASTING COMPANY OF
WEST VIRGINIA
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TEXAS
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